88-149

No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUMMA CORPORATION and WILLIAM R. LUMMIS,
Delaware Ancillary Administrator
of the Estate of Howard R. Hughes,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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QUESTIONS PRESENTED

Petitioners (collectively "Toolco") formerly controlled respondent ("TWA") through majority stock ownership, pursuant to orders of the Civil Aeronautics Board ("CAB") authorizing Toolco " 'to dictate the complete corporate activities' " of TWA. *Hughes Tool Co. v. TWA* ("*Toolco I*"), 409 U.S. 363, 372 (1973). When that CAB-approved control ended, TWA filed (1) a federal action claiming that certain CAB-approved activities of Toolco violated the antitrust laws and (2) a Delaware action claiming that the same CAB-approved activities violated fiduciary duties owed by Toolco to TWA. In *Toolco I*, this Court held that TWA's federal action was barred by section 414 of the Federal Aviation Act ("FAA"), which immunized CAB-approved activities "from the operations of the 'antitrust laws' . . . *and of all other restraints or prohibitions made by, or imposed under, authority of law.*" *See* 49 U.S.C.A. § 1384 (1976) (emphasis added). Notwithstanding *Toolco I* and the section 414 immunity from "all" legal restraints and prohibitions, the Delaware courts have now awarded TWA nearly $50,000,000 in damages, based on the very same transactions and damages theory at issue in *Toolco I*. The questions presented therefore are:

(1) Under the Supremacy Clause, may Delaware refuse collateral-estoppel effect to this Court's holdings in *Toolco I* that FAA § 414 bars liability on TWA's allegations and specifically bars damages predicated on TWA's damages theory?

(2) Under the Supremacy Clause and FAA § 414, may Delaware negate CAB orders and punish the conduct found in *Toolco I* to be approved by the CAB and hence immunized?

(3) Under the Supremacy Clause, was Delaware obliged to give res-judicata effect to *Toolco I* so as to bar litigation of state-court theories for which TWA could have but failed to invoke the pendent jurisdiction of the federal courts?

RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1, petitioner Summa Corporation provides the following information:

Parent Companies

The Hughes Corporation
Hughes Aviation Services, Inc.
H/S Las Vegas Associates
Howard Hughes Realty, Inc.
Hughes Entertainment Corporation

Affiliates and Subsidiaries (Except Wholly Owned Subsidiaries)

Hughes Properties, Inc.
Harolds Club, Inc.
Playa Vista Corporation
H.T.C. de Mexico, B.A. de C.V.
H-Tex, Inc.
Summa International Corporation
Hughes Aviation Services, Limited Partnership
Playa Vista Limited Partnership
Howard Hughes Properties, Limited Partnership
Hughes Entertainment, Ltd.
Hughes Parkway Associates
Park 2000 Associates
6701 Center Drive West, A California Limited Partnership
Wilshire Plaza Building Co., A California Limited Partnership
Husite, Inc.
Summerlin, Inc.

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IN THE

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OCTOBER TERM, 1987

No. 87-

SUMMA CORPORATION and WILLIAM R. LUMMIS,
Delaware Ancillary Administrator
of the Estate of Howard R. Hughes,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

Defendants below, Summa Corporation and William R. Lummis (collectively "Toolco"), hereby petition for a writ of certiorari to review the judgment of the Supreme Court of Delaware in favor of plaintiff below, Trans World Airlines, Inc. ("TWA").[1]

OPINIONS BELOW

Two opinions of the Supreme Court of Delaware (appended hereto) are pertinent. The more recent (dated April 4, 1988) is reported at 540 A.2d 403 (App. 1a). An earlier opinion (dated Feb. 26, 1975) is reported at 336 A.2d 572 (App. 13a).

[1] The complaint herein named as defendants Hughes Tool Company and its sole stockholder Howard R. Hughes. Hughes Tool changed its name to Summa Corporation in December 1972. Mr. Hughes died in 1976; petitioner William R. Lummis is the Delaware Ancillary Administrator of the Estate of Howard R. Hughes. The earlier federal action also named Hughes Tool and Mr. Hughes as defendants, but Mr. Hughes was never served.

Five opinions of the Delaware Court of Chancery are set forth in the separately bound Appendix.[2]

The pertinent opinions from the related federal action are this Court's decision at 409 U.S. 363 (1973); the court of appeals decision reviewed and reversed therein, 449 F.2d 51 (2d Cir. 1971); and the trial court decision dismissing the federal complaint on remand from this Court. 359 F. Supp. 783 (S.D.N.Y. 1973), App. 117a. In addition, ten pertinent orders of the Civil Aeronautics Board are reprinted at App. 121a-228a.

JURISDICTION

The decision of the Supreme Court of Delaware was rendered on April 4, 1988. A timely motion for rehearing was denied on May 5, 1988 (App. 229a).[3] Final judgment was entered on May 9, 1988 (App. 232a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982); *see also Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-62 (1984).

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix beginning at page 233a. They include the following:

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[2] The opinion denying Toolco's motion to dismiss (dated Feb. 19, 1974) is reported at 317 A.2d 114 (App. 28a). The opinion granting TWA's motion for summary judgment as to liability (dated May 10, 1977) is reported at 374 A.2d 5 (App. 45a). The opinions setting out issues for trial (dated March 12, 1985) (App. 62a), awarding damages (dated May 15, 1986) (App. 67a), and awarding interest (dated Jan. 21, 1987) (App. 99a) are unreported.

[3] Also on May 5, 1988, the Supreme Court of Delaware denied Toolco's Motion in the Alternative to Stay Issuance of the Mandate (App. 230a). On May 9, 1988, Toolco presented to Justice Brennan, as Circuit Justice, an Application to Stay Mandate of Supreme Court of the State of Delaware Pending Certiorari (No. A-859). That application was denied on May 13, 1988 (App. 231a). The judgment below has only been paid pending appeal, so the controversy remains alive. *See, e.g., Dakota County v. Glidden*, 113 U.S. 222, 224 (1885).

1. United States Constitution, art. VI, cl. 2;

2. Sections 102, 408, and 414 of the Federal Aviation Act of 1958, 49 U.S.C.A. §§ 1302, 1378, 1384 (1976);[4] and

3. Federal Rule of Civil Procedure 41(b).

STATEMENT

This case, here from the Supreme Court of Delaware, is a clone of *Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973) ("*Toolco I*"), which came here from the United States Court of Appeals for the Second Circuit. The case raises fundamental issues as to the supremacy of federal court judgments, federal statutes, and federal regulatory orders in state common-law litigation.

Both *Toolco I* and this case ("*Toolco II*") involve the same parties, the same timeframe and underlying facts, and the same supposed damages to plaintiff below, TWA. In *Toolco I*, this Court held that the Toolco actions upon which TWA sued were under the control and surveillance of the Civil Aeronautics Board ("CAB") and that various CAB orders immunized Toolco from suit pursuant to section 414 of the Federal Aviation Act of 1958 ("FAA"), 49 U.S.C.A. § 1384 (1976) (quoted below). In utter disregard of *Toolco I*, the Supreme Court of Delaware has now upheld a damages award to TWA, of nearly $50,000,000, predicated upon the same Toolco activities that were found in *Toolco I* to be approved by the CAB and immunized from suit. Review by this Court is urgently needed to protect the preclusive effects of this Court's judgments in related state proceedings, as well as to protect the power of Congress to immunize from suit business activities that have been considered and approved by a federal regulatory agency and the reliance interests of regulated entities on such agency approvals.

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[4] Sections 102, 408, and 414 of the Federal Aviation Act have since been amended and are codified as amended at 49 U.S.C. App. §§ 1302, 1378, 1384 (1982). Unless otherwise noted, all references herein to Federal Aviation Act provisions are to those before this Court in *Toolco I*, found at title 49 of the current U.S.C.A. (1976) and set forth in the Appendix. *See also* p. 14 n.26 & p. 21 *infra*.

A. Relevant Statutes, Background, And Complaints.

At the relevant times, section 408 of the FAA (App. 234a) empowered the CAB to approve acquisitions of control over an air carrier, if found to be in the "public interest." In turn, section 414 immunized CAB-approved conduct from the operation of the antitrust laws "and of all other restraints or prohibitions":

> Any person affected by any order made under section[ ] [408] . . . shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

In 1944, after adversary hearings, the CAB authorized Toolco to acquire control over TWA (in the form of 46 percent ownership). App. 121a.[5] In 1950, after further adversary proceedings, the CAB approved expansion of Toolco's control (up to 80 percent ownership). App. 131a.[6] Toolco's control ended on December 30, 1960, when its TWA shares were committed to a voting trust in connection with certain third-party financing for TWA (all as authorized by CAB order). App. 220a.[7]

After Toolco's operating control ended, TWA filed parallel lawsuits against Toolco in federal court (June 1961) and in Delaware (April 1962), each complaint alleging that Toolco had injured TWA in the amount of $35 million.[8] As now relevant, each complaint focused exclusively on events occurring in the period 1955-60—*i.e.*, when TWA was entering the jet age

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[5] *See T I*, 409 U.S. at 369; *T II*, App. 3a. The control order strictly limited transactions between Toolco and TWA to nominal amounts, to "insure against any temptation which may later come to [Toolco] to take advantage of the relationship to its own profit and to the detriment of the public interest." 6 C.A.B. 153, 156 (1944), App. 126a-127a; *see T I*, 409 U.S. at 370, 375.

[6] *See T I*, 409 U.S. at 373-76; *T II*, App. 3a.

[7] *See T I*, 409 U.S. at 376-77; *T II*, App. 3a.

[8] *See T I*, 409 U.S. at 377; *T II*, App. 3a; App. 237a (federal) & 269a (state).

under the CAB-approved control of Toolco.[9] TWA claimed that, from 1955-60, Toolco was slow to order then novel jet airplanes ("jetcraft"), bought jetcraft in Toolco's name for lease or resale to TWA, diverted to other airlines sixteen of 63 jetcraft once on order, caused delays in delivery of other jetcraft, and improperly handled financing arrangements for TWA.[10] The federal complaint alleged that Toolco's actions in 1955-60 violated the federal antitrust laws, while the Delaware complaint alleged that the same actions breached Toolco's state-law fiduciary duty as TWA's 78-percent shareholder.[11]

In each case, Toolco interposed as a principal defense the FAA § 414 immunity deriving from the CAB's two control orders (1944 and 1950) and various modifications thereof. App. 296a (federal) & 299a (state). The most pertinent modifications arose in 1959-60, when the CAB several times amended its control order specifically to permit Toolco and TWA to enter into leases about which TWA's lawsuits complained. The CAB had determined that the terms and conditions of each proposed lease were "just and reasonable and in the public interest."[12]

B. Federal Proceedings And This Court's Opinion.

For twelve years, TWA pursued its claim in the federal courts to the exclusion of the state action. *See Toolco II*, App. 3a.[13] The matter came to this Court after a default judgment

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[9] *See T I*, 409 U.S. at 377; *T II*, App. 3a, 9a; App. 71a-76a (Del. Ch. 1986). *See also* n.11 *infra*.

[10] *See T I*, 409 U.S. at 377-82; 449 F.2d 51, 65-66, 71-78 (2d Cir. 1971); *T II*, App. 3a, 7a-9a; App. 246a-254a (federal) & 271a-287a (state).

[11] *See T I*, 409 U.S. at 364, 366; *T II*, App. 2a-3a. However, it is pertinent to the res-judicata issue raised herein to note that the federal complaint also contained allegations as to certain Toolco activities after December 30, 1960, the date on which Toolco's CAB-approved control ended. As to those post-1960 activities, the federal complaint alleged both antitrust violations and pendent state-law claims for tortious interference with TWA's business. *See Toolco II*, App. 20a; App. 263a-266a (federal complaint).

[12] *See T I*, 409 U.S. at 375-76, 379, 383, 387; *T II*, App. 6a; App. 201a, 203a, 206a, 209a, 211a. *See also* p. 4 n.5 *supra*.

[13] In 1963, Toolco moved to stay the Delaware proceedings due to the pendency of the federal action on the same claim. The stay was denied but shortly thereafter proceedings were suspended, not to resume until 1973. *See* App. 108a-109a (Del. Ch. 1987).

on liability and protracted damage proceedings that foreshadowed in nearly every detail the more recent damage proceedings in Delaware.

As described by this Court, TWA was awarded damages in the federal action based primarily on "profits lost" as a result of "five transactions" whereby TWA came to have (1) only 47 jetcraft, (2) available later than TWA would have liked, and (3) provided by Toolco pursuant to leases (prior to January 1961). 409 U.S. at 378-79; *see also* 449 F.2d 51, 65-66 (2d Cir. 1971).[14] The damages were measured by the difference between TWA's actual profits (for the period 1959-63) and the profits that TWA hypothetically would have earned (1) with a 63-jet fleet, (2) earlier acquired, and (3) owned outright by TWA rather than leased from Toolco. The damages witnesses, the mode of proof, and the alleged injuries are set forth in detail in the opinion by the Second Circuit (449 F.2d at 65-66, 71-78) and were summarized by this Court at 409 U.S. at 378-79.

In *Toolco I*, this Court ruled squarely that *all* pertinent Toolco activities had been under the "control and surveillance" of the CAB and were necessary to effectuate what the CAB had found to be the "public interest." 409 U.S. at 366, 369, 378-79, 388-89. Suit by the newly independent TWA on Toolco's actions would "negate" CAB orders and "penalize" CAB-approved conduct. *Id.* at 388. Hence, section 414 barred liability for all "[t]hat TWA charged in its complaint"—including the "five transactions" upon which damages had been predicated. *Id.* at 378-79, 388-89; *see also* pp. 16-17 *infra*. This Court therefore reversed the damages award and directed that TWA's complaint be dismissed. 409 U.S. at 389. The trial court duly dismissed in May 1973 (359 F. Supp. 783 (S.D.N.Y. 1973), App. 117a), whereupon another fifteen years of litigation ensued in state court over the same claim, resulting in a virtually identical damages award.

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[14] These "five transactions" involved "diversion" of six Convair jets to Northeast Airlines, lease of four other Convairs to Northeast, "diversion" of six Boeing jets to Pan American Airways, "late delivery" of various jetcraft, and the 1959-60 jetcraft leases between Toolco and TWA. *See* 409 U.S. at 378-79.

C. Delaware Proceedings And The Opinions Below.

The prolonged state proceedings led to two pertinent decisions by the Supreme Court of Delaware.

1. 1975 Opinion Of The Delaware Supreme Court.

In the wake of *Toolco I*, Toolco moved for dismissal on grounds of res judicata and federal preemption. *See* App. 30a.[15] The motion was denied on the merits by the trial court (App. 28a (Del. Ch. 1974)), and Toolco appealed, raising the same points. *See* App. 15a, 23a. The Delaware supreme court affirmed in its 1975 opinion. App. 13a.

On res judicata, Toolco urged that the Delaware action should be dismissed because TWA had impermissibly split a single claim for relief between the federal and the state actions. *See* App. 15a, 19a. The Delaware supreme court agreed that "the facts alleged [in the Delaware action] are substantially the same as those pleaded in the anti-trust action."[16] The court held, however, that TWA had not been obliged to present its fiduciary-duty theory to the federal courts and that, in any event, the judgment in *Toolco I* was not entitled to res-judicata effect. *See* App. 15a-22a; *see also* pp. 24 & 26 *infra*.

On preemption, Toolco urged that, contrary to the Supremacy Clause and FAA § 414, a state fiduciary action on TWA's allegations would negate the CAB orders at issue in *Toolco I* and punish Toolco's CAB-approved activity. *See* App. 23a. On this issue, the Delaware supreme court limited itself to a very narrow ruling reflecting the undeveloped condition of the state-court record. The court concluded only that section 414 does

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[15] This Court has separately defined and applied the res-judicata and collateral-estoppel principles pertinent to this case. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982) (citations omitted); *see, e.g., Montana v. United States*, 440 U.S. 147, 153 (1979).

[16] App. 15a; *see also* App. 107a-108a (Del. Ch. 1987); App. 46a (Del. Ch. 1977); App. 30a (Del. Ch. 1974).

not "preempt [all] state regulation of the intra-corporate affairs of those subject to CAB jurisdiction" and therefore held that "TWA may proceed with the litigation." App. 24a-25a. At the same time, the Delaware court acknowledged Delaware's obligation on a fully developed record to "give deference to all that the CAB approves." App. 25a. The court further acknowledged the likely collateral-estoppel implications of *Toolco I* in that context, stating that "whether any particular issues were finally determined in the Federal action is not at issue in this appeal." *Id.*[17]

2. 1988 Opinion Of The Delaware Supreme Court.

Thereafter, by amended answer to the complaint, Toolco pleaded as affirmative defenses both that *Toolco I* barred TWA "from maintaining this action embracing the same subject matter and seeking damages for the same alleged injuries to TWA's business" and that section 414 immunized the Toolco actions sued upon. App. 302a, 305a. In 1977, on TWA's motion for summary judgment on the pleadings and over Toolco's federal defenses, the trial court held that Toolco's exercise of CAB-approved control over TWA constituted actionable self-dealing under Delaware law. *See* App. 50a-54a (Del. Ch. 1977). However, the trial court noted that, in the damages phase, "specific transactions approved by the Board [would be] . . . immune from further attack on the basis of State fidu-

[17] Toolco filed a petition for certiorari in this Court, limiting the petition to the res-judicata issue (that TWA had impermissibly split a claim for relief) in view of Delaware's apparent acknowledgment that section 414 would be applied and *Toolco I* be given collateral-estoppel effect on a fully developed record. *See* App. 313a. The petition was denied by this Court (*see* 423 U.S. 841 (1975) (No. 74-1653)), but the res-judicata issue remains open for review. First, as noted in *Toolco I* itself, a denial of certiorari does "not establish the law of the case or amount to *res judicata* on the points raised." 409 U.S. at 365 n.1; *see, e.g., United States v. Kras*, 409 U.S. 434, 461 (1973) (Marshall, J., dissenting) ("[w]hen we deny certiorari, no one, not even ourselves, should think that the denial indicates a view on the merits of the case"). Second, this Court has "jurisdiction to consider all the substantive federal questions determined in the earlier stages of the litigation." *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *see Urie v. Thompson*, 337 U.S. 163, 172-73 (1949).

ciary law by reason of the provisions of Section 414 of the [FAA]." *See* App. 53a-54a.

That acknowledgment of section 414 proved hollow. In subsequent damages discovery, TWA stated flatly that it would "claim the same damages in this action that [were] . . . awarded [plaintiff] in the Federal action." App. 317a. At the bench trial, before a new trial judge, TWA relied on the same witnesses to adduce the same damages theory, again focusing on the very same "transactions" at issue in *Toolco I.*[18] In short, the record lacking on the 1975 Delaware appeal fully revealed *Toolco II* to be a virtual carbon copy of *Toolco I.* Toolco renewed its federal defenses before and after trial. *See* App. 63a-64a, 320a-323a. But the trial court ruled that none of the damages sought by TWA were immunized (App. 63a-64a (Del. Ch. 1985)) and awarded TWA $48.3 million in damages (including interest), predicated upon the profits TWA would have earned (from 1959-63) with (1) a hypothetical 52-jet fleet, (2) earlier acquired, and (3) owned instead of leased. App. 68a-69a, 76a, 79a, 81a, 85a, 91a-95a (Del. Ch. 1986); App. 115a (Del. Ch. 1987).

This Delaware damages award is indistinguishable from that in the federal action, except that the state court found that an independent TWA would have acquired no more than 52 jetcraft (as opposed to the 63 hypothesized in the federal damages award). *See* App. 84a-85a, 91a-94a (Del. Ch. 1986). On its second Delaware appeal, Toolco contended that the transactions on which damages were predicated were "immune from plaintiff's attack," due "not only [to] the CAB proceedings and the immunity of FAA § 414 but [also to] the [*Toolco I*] decision . . . holding the immunity applicable to the very transactions involved here." *See* App. 326a. As in 1975, the Delaware supreme court acknowledged that the section 414 defense applies to a state fiduciary action. *Toolco II,* App. 4a-6a. The court also divided the Delaware damages award into five "categories" of damages that equate unmistakably to the "five transactions" at issue in *Toolco I. Compare* App. 8a-9a

[18] *Compare T I,* 409 U.S. at 378-79; 449 F.2d at 65-66, 71-78 *with T II,* App. 8a-11a; App. 68a-87a (Del. Ch. 1986); App. 107a-110a (Del. Ch. 1987); App. 315a-319a (TWA discovery responses). *See also* pp. 16-18 *infra.*

with Toolco I, 409 U.S. at 378-79; *see also* pp. 16-18 *infra*. By force of collateral estoppel, *Toolco I* should have been held to establish conclusively that section 414 barred liability in each Delaware damages "category." Instead, the Delaware court upheld the damages award in full, in an opinion that reflects a shocking failure to give any collateral-estoppel or precedential effect whatever to *Toolco I*. *Compare Toolco II*, App. 8a-11a *with Toolco I*, 409 U.S. at 378-79, 388-89; *see* pp. 16-18 *infra*.

The pertinent portion of the Delaware opinion is only two paragraphs long and offers not one word of explanation as to why, in the face of collateral-estoppel principles, a Delaware fiduciary action may predicate damages upon the very same transactions that *Toolco I* held to be immune. Rather, the Delaware court simply considered itself free to determine *ab initio* what "conduct" was the "subject of CAB review or approval" and asserted, without reasons or analysis, that the transactions on which damages were predicated were not immunized by CAB action. *Toolco II*, App. 4a-6a. This was precisely the same conclusion reached by the Second Circuit in the federal litigation and emphatically rejected by this Court. 409 U.S. at 378-86.[19]

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[19] On its face, the Delaware opinion may create a false impression that Delaware at least gave effect to the CAB-approved leases of jetcraft from Toolco to TWA. In this regard, the Delaware court stated that *Toolco I* held CAB-approved leases to be immunized by section 414 and hence Toolco had not been required to account in Delaware for "profits" enjoyed in such transactions. *Toolco II*, App. 4a-6a. But Delaware's asserted deference to the CAB's leasing orders is purely formal and semantic and illustrates vividly how Delaware did violence to this Court's holdings in *Toolco I*. While Delaware did not oblige Toolco to pay damages measured by lease "profits," the same result was achieved by another means. One-third of the Delaware damages award (approximately $5.6 million without interest or $15.6 million with interest) was predicated on Toolco-TWA lease transactions and expressly sought to recompense TWA for the "[i]ncreased expenses" resulting from jetcraft leases as opposed to the lower costs of ownership. *Toolco II*, App. 8a; *see* App. 69a (Del. Ch. 1986). The very same damages had been sought and awarded in the federal action (in the amount of $5.3 million) and were held by this Court to be barred by section 414, with repeated notations that each lease transaction had been specifically approved by the CAB. *See* 409 U.S. at 375-76, 379, 383, 387; *see also id.* at 405 n.18 (Burger, C.J., dissenting); 449 F.2d at 75; Special Master Report at 185 (App. 308a).

REASONS FOR GRANTING THE WRIT

It is impossible to gainsay that *Toolco II* is completely contrary to this Court's opinion and judgment in *Toolco I*. Review therefore is urgently needed to protect the collateral-estoppel and res-judicata effects of *Toolco I*, as well as the supremacy of federal statutes and agency orders.

Delineating the preclusive effects of federal judgments in subsequent state actions has been an important responsibility of this Court throughout its history.[20] And the Court's ongoing attention to such issues is imperative for the sound administration of justice in our federal system. First, under the Supremacy Clause, the preclusive effect of federal court judgments is of constitutional dimension. Thus, "[i]t would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4468, at 648 (1981); *see, e.g., Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-62 (1984); *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499, 517-21 (1903). Second, and more generally, collateral estoppel and res judicata are both "fundamental precept[s] of common-law adjudication," which are "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 (1979). These preclusion rules bring "an end of litigation"[21] and "foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions."[22]

Here, the unthinkable has occurred in Delaware's failure to give collateral-estoppel effect to *Toolco I*. In that decision, the Supreme Court of the United States upheld a defense predicated on a federal statute and said definitively which Toolco conduct was immunized by FAA § 414. The same federal defense was then implicated again in Delaware litigation between the same

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[20] *See* the cases, dating from 1818, cited at p. 13 n.25 & p. 22 n.32 *infra*.

[21] *Baldwin v. Iowa State Travelling Men's Ass'n*, 283 U.S. 522, 525 (1931); *see Stoll v. Gottlieb*, 305 U.S. at 172 ("It is just as important that there should be a place to end as that there should be a place to begin litigation").

[22] *Montana*, 440 U.S. at 153-54.

parties on the same facts. Under the Supremacy Clause, it is difficult to conceive where collateral-estoppel principles could apply with greater force, for the discharge of this Court's unique duties demands that its judgments on federal questions be both supreme and conclusive. *See Limbach v. Hooven & Allison Co.*, 466 U.S. at 361-62; *Des Moines Navigation Co. v. Iowa Homestead Co.*, 123 U.S. 552, 553-55, 559 (1887); *Deen v. Hickman*, 358 U.S. 57, 58 (1958). Yet Delaware failed to give preclusive effect to *Toolco I* on the section 414 issue, and failed to explain why it might be thought free so to proceed. As shown in Part I below, such an affront to this Court cannot be allowed to stand uncorrected. *See, e.g., Des Moines*, 123 U.S. at 559; *Deen v. Hickman*, 358 U.S. at 58. Review is especially important here because, as shown in Part II below, Delaware's decision on the merits itself violates the Supremacy Clause by negating CAB orders, penalizing CAB-approved conduct, and seeking to displace federal regulation over control relationships in the air-carrier industry. *See Mississippi Power & Light Co. v. Mississippi*, 56 U.S.L.W. 4751, 4755-57 (U.S. June 24, 1988).

This case also presents an important and recurring issue under the res-judicata prohibition against the splitting of claims. As shown in Part III below, TWA chose not to invoke the pendent jurisdiction of the federal courts over a state-law theory applicable to the facts alleged in the federal action. Now, after TWA's federal theory failed in federal court, Delaware has allowed TWA to recover on its state-law theory in a second action premised on the same facts. Delaware's res-judicata holding conflicts squarely with at least nine decisions, by state supreme courts and federal appellate courts, barring unsuccessful federal litigants from going to state court to litigate state-law theories for which federal pendent jurisdiction could have been (but was not) invoked.[23] Plainly, this has become a frequent tactic of unsuccessful litigants, presenting a recurring question that has not been but should be decided by this Court.

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[23] The authorities in conflict with Delaware are cited at p. 24 n.36 & p. 25 n.37 *infra*. *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (majority did not reach issue but three Justices writing separately would have barred subsequent state action for plaintiffs' failure to invoke federal pendent jurisdiction over state-law theory).

Not only are the issues here "special and important" ones meriting review under Sup. Ct. R. 17.1, they make a unique and compelling claim for review. Prior to the final disposition of *Toolco I*, these parties, these facts, and these damage claims had been in the federal courts for a dozen years, resulting in twelve published opinions [24] and consuming more than 100,000 attorney hours and $15 million in legal fees. *See Toolco I*, 409 U.S. at 393 (Burger, C.J., dissenting). Yet those federal-court labors counted for naught when, as do so many defeated civil litigants, TWA sought a second chance in a state court, which impermissibly proceeded as though *Toolco I* had never been decided by this Court.

I. THE DECISION BELOW CONFLICTS WITH LONG-STANDING ESTOPPEL PRECEDENTS OF THIS COURT AND DISREGARDS THE *TOOLCO I* HOLDINGS ON THE SCOPE OF TOOLCO'S SECTION 414 DEFENSE.

For two centuries, this Court has held that, in a second action, a state court must give collateral-estoppel effect to specific issues resolved in a prior federal adjudication.[25] In *Montana v. United States*, 440 U.S. at 154-55, and *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169 (1984), this Court recently identified two prerequisites for an estoppel in subsequent litigation between the same parties—constancy of "controlling facts or legal principles . . . since the [first] action" and an attempt to relitigate issues "in substance the same as those [already] resolved." *Montana*, 440 U.S. at 154-55; *see Stauffer*, 464 U.S.

[24] In addition to this Court's opinion, these were as follows: 515 F.2d 173 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973); 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965); 1974-1 Trade Cas. (CCH) ¶ 74,889 (S.D.N.Y. 1974); 359 F. Supp. 783 (S.D.N.Y. 1973); 314 F. Supp. 94 (S.D.N.Y. 1970); 312 F. Supp. 478 (S.D.N.Y. 1970); 308 F. Supp. 679 (S.D.N.Y. 1969); 38 F.R.D. 499 (S.D.N.Y. 1965); 1963 Trade Cas. (CCH) ¶ 70,767 (S.D.N.Y. 1963); 29 F.R.D. 523 (S.D.N.Y. 1961).

[25] *See, e.g., Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 311-22 (1818); *Embry v. Palmer*, 107 U.S. 3, 9-10 (1882); *Deposit Bank v. Frankfort*, 191 U.S. at 514-20; *Myers v. International Trust Co.*, 263 U.S. 64, 69 (1923); *Stoll v. Gottlieb*, 305 U.S. at 170-71; *Limbach v. Hooven & Allison Co.*, 466 U.S. at 361-62.

at 169. Under those standards, there is no conceivable basis in fact or law for Delaware's unexplained failure to give preclusive effect to *Toolco I* on the issues presented by Toolco's section 414 defense.

The Delaware courts have repeatedly acknowledged that the facts are the same here as in *Toolco I* (*see* p. 7 & n.16 *supra*), and the two actions have in common the section 414 defense. On its face, section 414 immunizes covered activity equally from the "operations of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law." FAA § 414, 49 U.S.C.A. § 1384 (1976). And, as already noted, the Delaware supreme court twice acknowledged, albeit failing to follow through, that transactions exempt from the antitrust laws under FAA § 414 also are exempt from the reach of a state fiduciary action. *See Toolco II,* App. 6a; App. 25a; *see also* p. 10 n.19 *supra.*[26]

This Court's entire inquiry in *Toolco I* was to determine which Toolco activities were within the scope of the section 414 defense. When the same issues arose again in *Toolco II,* Delaware was obliged to give preclusive effect to a prior adjudication of that issue, especially one carrying the imprimatur of this Court. *See, e.g. Stauffer,* 464 U.S. at 169-72; *Montana,* 440 U.S. at 153-54; *Deen v. Hickman,* 358 U.S. at 58; *Des Moines,*

[26] Notably, FAA § 414, originally enacted as section 414 of the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973, 1004, was modelled upon section 10 of the Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211, 215 (1933), a provision now codified (as amended) at 49 U.S.C. § 11341 (1982). The latter section has been applied by this Court to immunize transactions approved by the Interstate Commerce Commission from the operation of state-law "restraints or prohibitions." *See, e.g., Seaboard Air Line R.R. Co. v. Daniel,* 333 U.S. 118, 126 (1948). Subsequent to *Toolco I,* Congress phased the CAB out of existence and amended FAA §§ 408 and 414, by sections 26, 30 and 40 of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1726-28, 1731, 1744-47 (codified as amended at 49 U.S.C. App. §§ 1378, 1384, 1551(a)(7), (b)(1)(C) (1982 & Supp. III 1985)). As the Delaware supreme court implicitly recognized, those 1978 amendments are not pertinent to the effect of the CAB's control and surveillance in the period 1944 to 1960. *See also* p. 21 *infra.* Nor has this Court ever called into question its holding in *Toolco I,* contrary to the situation in *Limbach v. Hooven & Allison Co.,* 466 U.S. at 360-61.

123 U.S. at 553-55. Instead, without ever giving one word of explanation as to why collateral-estoppel principles might be thought inapplicable, the Delaware court ignored *Toolco I* and determined *ab initio* what had been "approved" by the CAB and which "transactions were immunized by CAB authority." *Toolco II*, App. 6a. In so proceeding, Delaware disregarded *Toolco I* adjudications, both broad and narrow, that required reversal of the trial court judgment in its entirety.

A. *Toolco I* Held All Pertinent Toolco Activities To Be Within The Section 414 Defense.

In applying section 414 in *Toolco I*, this Court placed great emphasis on the CAB's 1950 order authorizing expansion of Toolco's control (from 46 to 80 percent ownership). *See* 409 U.S. at 371-76, 381-82. Aware of Toolco-TWA differences concerning "the type, quantity, timing, and financing of new equipment acquisitions," the CAB nonetheless determined that Toolco's operational and financial contributions to TWA were "essential to both TWA and the public interest." *Id.* at 375, 381, 388.

Standing alone, these 1950 determinations by the CAB persuaded this Court that the Second Circuit had "erred . . . in construing § 414" to allow suit on TWA's allegations:

> [T]he Board not only approved Toolco's ownership of TWA stock but it also contemplated actual and legal control of TWA by Toolco. The Board made it as plain as possible that Toolco's [80 percent] stock ownership would inevitably result in Toolco's exercising authority over the day-to-day affairs of TWA, including the acquisition and financing of equipment. It was precisely this kind of control the Board approved. Toolco's power of decision with respect to these matters was central to the public-interest issue. What is more, the Board . . . concluded that Toolco's stewardship [as a 46-percent owner] . . . had been a great benefit to TWA and to the public [and] . . . that the additional control sought by Toolco and continuation of the TWA-Toolco relationships were essential to the public interest.

Id. at 386. Damage actions concerning Toolco's conduct toward TWA would "negate what the Board, after full investigation, had found consistent . . . with the public interest" and would "penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.* at 388. Accordingly, *Toolco I* held that section 414 immunized all "[t]hat TWA charged in its complaint." *Id.*

The Delaware courts have always acknowledged that the state-court complaint alleges the same damages, arising out of the same activities, as did the federal complaint. *See* p. 7 & n.16 *supra.* Moreover, discovery and trial fully confirmed the copycat nature of *Toolco II.* *See* p. 9 *supra.* Hence, the Delaware court should have reversed on the ground that *Toolco I* broadly barred any recovery on TWA's state complaint. *See, e.g., Montana,* 440 U.S. at 156-58; *Des Moines,* 123 U.S. at 553-55.

B. *Toolco I* Held That Section 414 Immunized The Specific Transactions On Which Damages Were Predicated Below.

In any event, *Toolco I* specifically reversed a damages award based on "profits lost" as a result of "five transactions" whereby TWA came to have (1) only 47 jetcraft out of 63 once on order, (2) available later than TWA would have liked, and (3) provided by Toolco pursuant to leases (prior to January 1961). *See* 409 U.S. at 378-79. Thus, even if read as narrowly as possible, *Toolco I* held that section 414 barred an award of damages predicated on those transactions, precluding relitigation of those issues. Yet, in utter disregard of *Toolco I,* the Delaware supreme court has ruled that TWA may have nearly $50 million in damages (including interest) predicated on the very same transactions and the very same damages theory at issue in *Toolco I. Compare Toolco II,* App. 5a, 8a-11a *with Toolco I,* 409 U.S. at 378-79. Lest there be any doubt on this score:

Fleet Size. This Court held that, under section 414, damages could *not* be had for "profits lost" due to three transactions which "diverted" to other airlines sixteen of the 63 Convair and

Boeing jets that Toolco once had on order for possible use by TWA. *See Toolco I,* 409 U.S. at 378. That holding ruled out damages predicated on the claim that Toolco should have supplied to TWA more than 47 of the 63 jetcraft once on order. Nonetheless, the Delaware court upheld approximately $12 million in damages for "Decreases in TWA's operating income as a result of being limited to a smaller total fleet of [47] jet aircraft." *Toolco II,* App. 8a. As in the federal action, those damages were measured by the additional profits TWA would have earned with a larger "pro forma [52] jet fleet" that included five of the diverted jets at issue in *Toolco I. Toolco II,* App. 10a; *see* App. 81a, 94a (Del. Ch. 1986).

Delays. This Court further held that, under section 414, damages could *not* be had for "profits lost" due to "[t]he late delivery" of jetcraft. *Toolco I,* 409 U.S. at 378-79. Nonetheless, the Delaware court upheld approximately $19.2 million in damages for "Decreases in TWA's operating income for delayed delivery" of the very same jetcraft. *Toolco II,* App. 8a; *see* App. 81a, 94a (Del. Ch. 1986).

Leases. This Court held that, under section 414, damages could *not* be had for "profits lost" due to "[t]he lease, instead of outright sales, of jets in 1959-1960." *See Toolco I,* 409 U.S. at 378-79. The Court also noted repeatedly that the CAB had approved the terms and conditions of each Toolco-TWA lease as "just and reasonable and in the public interest." *Id.* at 375-76, 379, 387. This Court thus ruled out damages predicated on the claim that TWA should have been allowed to own the jetcraft leased from Toolco in 1959-60. Nonetheless, the Delaware supreme court upheld approximately $15.6 million in damages for "Increased expenses from being denied the right to acquire ownership of jet aircraft prior to December 30, 1960." *Toolco II,* App. 8a; *see also* p. 10 n.19 *supra.*[27]

[27] In each action, TWA also was awarded more than $500,000 in damages (more than $1.5 million after Delaware interest) for what the Delaware supreme court referred to as "Consequential damages, other than decreases in operating income, attributable to delayed delivery of Convair jet aircraft." *Toolco II,* App. 8a, 11a; *see* Special Master Report at 301 (App. 310a). This

In short, Delaware's contradiction of *Toolco I* on damage issues is not open to the slightest doubt or qualification. TWA stated that it would seek the same damages as in the federal action (*see* p. 9 *supra*) and, as shown above, the $48.3 million damage award here consisted *entirely* of damages held to be barred in *Toolco I*. Had Delaware applied *Toolco I*, the Delaware damages award would have fallen in its entirety. Thus, in upholding this award of damages over Toolco's collateral-estoppel defense, Delaware has perpetrated a shocking and intolerable affront to this Court and has subverted gravely the policies served by the Supremacy Clause and collateral estoppel.

II. IN VIOLATION OF THE SUPREMACY CLAUSE, DELAWARE NEGATED CAB ORDERS, PENALIZED TOOLCO'S EXERCISE OF CAB-APPROVED CONTROL, AND DISPLACED THE CONGRESSIONAL FRAMEWORK GOVERNING CONTROL OF AIR CARRIERS.

As already shown, *Toolco II* not only failed to give collateral-estoppel effect to *Toolco I* but also proceeded to uphold damages that *Toolco I* said would "negate" CAB orders and "penalize" Toolco for carrying out CAB-approved activities. *See* 409 U.S. at 388. Thus, Delaware's error in withholding collateral-estoppel effect from *Toolco I* was compounded by merits holdings that independently raise important issues under the Supremacy Clause concerning the effect of federal statutes and federal agency orders in state common-law litigation.[28] Indeed, if left standing, the opinion of this influential state court will encourage the various states to make common-law fiduciary

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Court did not specifically refer to this comparatively minor damage item but clearly was cognizant of it. *See Toolco I*, 409 U.S. at 378 (damages "primarily" based on "profits lost"); Toolco Op. Br. in No. 71-827, at 21 (App. 311a). The judgment in *Toolco I* thus barred damages on this item as well. Moreover, damages for this item obviously fall due to the inability to sue for delayed delivery of the Convair jetcraft.

[28] This Court has regularly reviewed cases where common-law causes of action allowed by the states were claimed to intrude impermissibly on regulatory programs enacted by Congress or on agency decisions. *See, e.g., Boyle v. United Technologies Corp.*, 56 U.S.L.W. 4792 (U.S. June 27, 1988); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

actions into engines of regulation intended to displace and contradict federal statutes by which Congress has given jurisdiction to a federal agency to determine what regulated activities are just and reasonable and in the public interest.

Under FAA § 408(b), the CAB was empowered to authorize Toolco control over TWA, if in the "public interest" and "upon such terms and conditions as it shall find to be just and reasonable." *See* App. 234a. Relevant considerations for the CAB included the "foster[ing of] sound economic conditions" in TWA, the "promotion of adequate, economical, and efficient service" by TWA, and TWA's competitiveness. *See* FAA § 102(b)-(d), 49 U.S.C.A. § 1302(b)-(d) (1976), App. 233a. In 1950, the CAB found it "essential to the best interests of the carrier and the public" to authorize Toolco's complete control over TWA (12 C.A.B. 192, 224 (App. 194a)); *see Toolco I*, 409 U.S. at 375), deliberately giving Toolco "power of decision" over "the acquisition and financing of equipment." *Id.* at 386. In 1959-60, the CAB specifically found that it would be "just and reasonable" to permit the jetcraft leases at issue in *Toolco I* and *II*. *See Toolco I*, 409 U.S. at 375-76, 379, 383, 387; App. 201a, 203a, 206a, 209a, 211a.

In section 414, Congress expressly addressed the preemptive effects of CAB control orders, providing that *no* "restraints or prohibitions" were to impede effectuation of what the CAB had approved. *See Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118, 124-27 (1948) (applying similar statute); *see also* p. 14 n.26 *supra*. But even in the absence of a preemption provision such as section 414 in a federal statute, there " 'can be no divided authority over interstate commerce . . . the acts of Congress on that subject are supreme and exclusive.' " *Mississippi Power & Light Co. v. Mississippi*, 56 U.S.L.W. at 4757. In *Mississippi Power*, this Court recently held that a state had impermissibly exercised "divided authority" over a federally-regulated activity when it "alter[ed] FERC-ordered allocations of [electric] power by substituting [its] own determinations of what would be just and fair." *Id.* at 4756; *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). Here, equally impermissibly, Delaware has sought through a fiduciary action to exercise a "divided authority" over the Toolco-TWA control relationship

by substituting Delaware determinations for determinations by the CAB that Toolco's control over TWA was in the public interest and on just and reasonable terms.

Toolco II characterized Toolco's transgression under Delaware fiduciary law as "den[ying] TWA the *control* required to be competitive in the airline industry." App. 6a (emphasis added). And the Delaware damages award sought to put TWA in the position it would have occupied had Toolco not acquired or exercised "five areas of *control*" over jetcraft acquisition in 1955-60. App. 5a (emphasis added); *see* App. 68a-69a (Del. Ch. 1986). The damages award thus sought to undo the CAB's 1944 and 1950 control orders and the lease approvals. *See Toolco II*, App. 6a-11a. In place of the CAB's determination that Toolco control was "essential to the best interests of the carrier and the public," [29] Delaware substituted a determination that TWA would have been better off free of Toolco's control. *See, e.g.*, App. 7a. Likewise, in place of the CAB's determinations that each Toolco-TWA lease at issue was "just and reasonable and in the public interest," [30] Delaware substituted its determination that the leases did not "comport" with concepts of "fair dealing under the fiduciary standards of Delaware corporation law." App. 7a; *see* p. 10 n.19 & p. 17 *supra*.

Delaware's efforts to regulate the Toolco-TWA control relationship patently " 'conflict with [and] interfere with federal authority over the [federally regulated] activity.' " *Mississippi Power*, 56 U.S.L.W. at 4757. It was the CAB, not the Delaware courts, that Congress charged to determine whether Toolco control would advance or impede TWA's efficiency, competitiveness, and other interests and whether Toolco control was on "just and reasonable" terms. The CAB approved complete control, retained continuing jurisdiction over the control relationship, approved Toolco-TWA leases, and was never overturned on direct judicial review. *See Toolco I*, 409 U.S. at 381-83, 386-88; FAA § 1006, 49 U.S.C.A. § 1486 (1976) (exclusive review of CAB orders in federal courts of appeals). Delaware therefore acted impermissibly when it "regulate[d] in areas where [the

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[29] 12 C.A.B. at 224 (App. 194a); *see Toolco I*, 409 U.S. at 375.

[30] *See Toolco I*, 409 U.S. at 375-76, 379, 383, 387; App. 201a, 203a, 206a, 209a, 211a.

CAB] ha[d] properly exercised its jurisdiction to determine just and reasonable" control relationships, "conduct[ed] . . . proceedings that challenge[d] the reasonableness" of the CAB's actions, and collaterally attacked the CAB orders. *Mississippi Power,* 56 U.S.L.W. at 4757; *see Seaboard Air Line,* 333 U.S. at 124-26.

In papers filed with Justice Brennan,[31] TWA has asserted that *Toolco II* does not merit review because the Airline Deregulation Act of 1978 amended section 414 to delete the statutory immunity from "all other restraints or prohibitions," thereby limiting the section 414 immunity to antitrust actions. *See* 49 U.S.C. App. § 1384 (1982); *see* p. 14 n.26 *supra.* But the certworthiness of this case is not affected by the 1978 amendment, which was part of a broad overhaul in which the CAB itself, and its regulatory responsibilities, were phased out of existence. *See* 49 U.S.C. App. § 1551 (1982 & Supp. III 1985). First, the 1978 amendment was not retroactive, does not apply to the facts at issue, and thus is irrelevant to the questions presented for review. Those questions involve Delaware's obligation to give collateral-estoppel and res-judicata effect to a decision of this Court, and its independent obligation under the Supremacy Clause to give effect to applicable federal statutes and regulatory orders. *See Mississippi Power,* 56 U.S.L.W. at 4757. Second, provisions like section 414 serve important purposes by expressly delineating the preemptive effects of regulatory decisions. At least one similar federal statute is still in effect (*see* p. 14 n.26 *supra*), and the decision below should not be allowed to stand as a precedent or as an impediment to similar congressional enactments.

III. THE DECISION BELOW CONFLICTS WITH NUMEROUS STATE AND FEDERAL DECISIONS AS TO THE RES-JUDICATA EFFECT OF A FEDERAL-COURT JUDGMENT ON A SUBSEQUENT ACTION RAISING STATE-LAW THEORIES PREDICATED ON THE SAME FACTS.

As on collateral-estoppel issues, the states have long been obliged under the Supremacy Clause to give res-judicata effect

[31] *See* TWA's Opposition to Application to Stay Mandate of Supreme Court of the State of Delaware Pending Certiorari in No. A-859 (May 12, 1988), p. 4; *see also* p. 2 n.3 *supra.*

to federal-court judgments.[32] The fundamental purpose of federal res-judicata doctrine is "to require a plaintiff to try his whole . . . case at one time" and not to "split up his claim." *United States v. California & Oregon Land Co.*, 192 U.S. 355, 358 (1904); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 320 (1927). If a plaintiff does split a claim for relief between two actions, the first action to proceed to final judgment "on the merits" bars continuation of the other action on "all grounds for . . . recovery that were previously available to the part[y], regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

Under these federal res-judicata principles, this Court's judgment in *Toolco I* should have barred further proceedings in *Toolco II*—TWA could have invoked (but did not invoke) federal pendent jurisdiction to litigate its state fiduciary-duty theory, as well as its federal antitrust theory, in the federal action.[33] In permitting TWA to proceed in Delaware after *Toolco I* (*see* p. 7 & p. 8 n.17 *supra*), Delaware held that TWA had been under no obligation to invoke federal pendent jurisdiction over its state-law theory. Delaware's decision is squarely in conflict with decisions by at least seven state supreme courts and two federal courts of appeals on the important federal question of the appropriate relationship between pendent jurisdiction and the prohibition against claim-splitting.

A. In Conflict With Numerous State And Federal Court Decisions, Delaware Held That TWA Was Not Obliged To Invoke The Pendent Jurisdiction Of The Federal Court Over Its State-Law Theory.

As to Toolco's 1955-60 activities, TWA's federal complaint (1961) and its state complaint (1962) alleged the same facts,

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[32] *See, e.g., Des Moines*, 123 U.S. at 559; *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641-42 (1900); *West Side Belt R.R. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 99, 102 (1911); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986).

[33] This res-judicata effect should have been recognized wholly independent of the collateral-estoppel effect of *Toolco I* on the issues raised by Toolco's section 414 defense. In other words, under res-judicata principles, it is the fact of this Court's final judgment in *Toolco I*, rather than the Court's specific holding, that precludes further litigation of unraised theories applicable to the same facts. *See* pp. 26-28 *infra*.

collaterally attacked the same CAB orders, and sought the same damages for the same allegedly wrongful conduct, respectively invoking a federal antitrust theory and a state fiduciary-duty theory. *See* pp. 4-5 *supra*. It is evident that TWA thus split between the federal action and the state action a single claim for relief based on Toolco's allegedly improper exercise of CAB-approved control from 1955-60.[34] This claim-splitting was not forced upon TWA (and thus possibly excused) by some insuperable limitation on the federal court's jurisdiction. To the contrary, under the doctrine of pendent jurisdiction, the federal court in *Toolco I* plainly had power to adjudicate both the federal theory and the state theory applicable to the "common nucleus of operative fact[s]" alleged in TWA's two complaints. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *see Hurn v. Oursler*, 289 U.S. 238, 245-47 (1933).

TWA clearly recognized the availability of pendent jurisdiction when the federal complaint was filed in 1961. As noted above, while alleging only a federal theory as to the years 1955-60 now at issue, the federal complaint presented both federal antitrust and pendent state tort theories as to certain Toolco activities in 1961 (after Toolco's CAB-approved control ended). *See* p. 5 n.11 *supra*. The federal trial court proceeded to exercise its pendent jurisdiction over TWA's post-1960 state-law theory (awarding no damages). *See Toolco II*, App. 20a; *TWA v. Hughes*, 359 F. Supp. at 785, App. 118a. Hence, there is every reason to believe that the federal court would have exercised pendent jurisdiction over TWA's state fiduciary-duty theory as to the period 1955-60, if asked to do so. This is especially true because of the close nexus between TWA's fiduciary-duty theory (predicated upon use of Toolco's CAB-approved control) and Toolco's section 414 defense (predicated upon the CAB's control orders). *See United Mine Workers*, 383 U.S. at 727 (when state theory is "closely tied to questions of federal policy . . . the argument for exercise of pendent jurisdiction is particularly strong").

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[34] *See, e.g., Baltimore S.S. Co. v. Phillips*, 274 U.S. at 321; *see also Woods Explor. & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1314-15 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362, 363-64 (5th Cir. 1961).

Given the compelling indications that the federal trial court would have exercised pendent jurisdiction over TWA's fiduciary-duty theory, Delaware should have held that TWA had impermissibly split a claim for relief and that the final judgment in *Toolco I* barred litigation on the state theory. Instead, while agreeing that a claim had been split, Delaware found the splitting to be permissible because the exercise of pendent jurisdiction is discretionary, there was "uncertain[ty]" as to whether jurisdiction would have been exercised by the federal court,[35] and doubt on that question was to be resolved in favor of allowing TWA to litigate anew in Delaware. App. 19a-22a. In short, Delaware held that TWA's failure to invoke federal pendent jurisdiction was not pertinent to the res-judicata issue because the trial court *might* have declined jurisdiction.

In this regard, Delaware is squarely in conflict with res-judicata decisions of at least seven state supreme courts [36] and

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[35] In stating reasons why pendent jurisdiction might not have been exercised over the fiduciary-duty theory, the Delaware court disregarded completely the actual course of the litigation and indulged in counterfactual speculation. In fact, two lower federal courts rejected Toolco's section 414 defense, and Toolco was obliged to endure a dozen years of merits and damages litigation in the federal courts over the federal antitrust theory applicable to the years 1955-60. Thus, had TWA's federal complaint invoked pendent jurisdiction over the fiduciary-duty theory applicable to those years, TWA could have had twelve years in court on its state theory. Yet, in assessing whether the district court would have exercised pendent jurisdiction over the state theory as to 1955-60, Delaware concluded that analysis should be predicated on the fanciful hypothesis that the federal claims had been dismissed as insubstantial at the outset of the action. *See Toolco II*, App. 20a-22a. Plainly, however, in assessing whether the district court would have exercised pendent jurisdiction over TWA's fiduciary-duty theory, the relevant perspective is what the federal courts *actually* did with TWA's federal claims from 1961 to 1973, not what a trial court might have done with similar claims, involving other litigants, after this Court had decided *Toolco I*.

[36] *See Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 768-69 (Ala. 1981); *Hill v. Wooten*, 279 S.E.2d 227, 228-29 (Ga. 1981); *Silver v. Queen's Hosp.*, 629 P.2d 1116, 1122 (Haw. 1981); *Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 440 N.E.2d 1164, 1169 (Mass. 1982); *Rennie v. Freeway Transp.*, 656 P.2d 919, 923 (Or. 1982); *Jeanes v. Henderson*, 688 S.W.2d 100, 104 (Tex. 1985); *Belliston v. Texaco, Inc.*, 521 P.2d 379, 380 (Utah 1974); *see also Boccardo v. Safeway Stores, Inc.*, 184 Cal. Rptr. 903, 911-14 (Cal. Ct. App. 1982); *McCann v. Whitney*, 25 N.Y.S.2d 354, 357 (N.Y. Sup. Ct. 1941); *Juneau Square v. First Wisconsin Nat'l Bank*, 364 N.W.2d 164, 170 (Wis. Ct. App. 1985).

two federal courts of appeals,[37] illustrated by *Rennie v. Freeway Transport*, 656 P.2d 919 (Or. 1982). There, after plaintiff lost a securities action in federal court, the Supreme Court of Oregon held that res judicata precluded related state proceedings because plaintiff could have invoked federal pendent jurisdiction over his state-law theory (but failed to do so). In rejecting plaintiff's argument that the federal court might have declined to exercise pendent jurisdiction, the Oregon court stated:

> We are convinced that the [appropriate] rule, the one more consonant with the policies behind *res judicata*, is that a plaintiff *must attempt* to have all claims against a defendant arising out of one transaction adjudicated in one court in one proceeding, at least insofar as possible, despite the fact that the various claims may be based on different sources of law.

Id. at 924 (second emphasis added). Similarly, the United States Court of Appeals for the Seventh Circuit has stated that the "uncertainty over whether a [federal] trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources." *Harper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 939, 946 (7th Cir. 1981). Under the approach in *Rennie* and *Harper Plastics*, TWA's failure to invoke federal pendent jurisdiction should not have been forgiven on Delaware's analysis that the federal court *might* have declined to exercise jurisdiction.

This Court should resolve this fundamental conflict over an important and frequently recurring issue of federal res-judicata doctrine.[38] First, it is imperative that there be certainty in res-

[37] *See Harper Plastics v. Amoco Chems. Corp.*, 657 F.2d 939, 946 (7th Cir. 1981); *Woods Explor. & Prod. Co.*, 438 F.2d at 1315. These holdings arose in the context of attempts to enjoin state-court proceedings due to the res-judicata effect of a prior federal judgment.

[38] This question was not reached in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), but three Justices would have followed the approach of *Rennie* and *Harper Plastics*. *See* 452 U.S. at 404 (Blackmun & Marshall, JJ., concurring) ("Since there is no reason to believe that it was clear at the outset of this litigation that the District Court would have declined

judicata law so it is desirable to extinguish any conflict pitting a state court of last resort against other state or federal courts. *See Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981). Second, res judicata "is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299 (1917); *see Federated Department Stores,* 452 U.S. at 401. The Delaware court's holding frustrates federal res-judicata policies by subjecting winning federal litigants like Toolco to "the expense and vexation attending multiple lawsuits" and to the risk (here the reality) of "inconsistent decisions." *Montana v. United States,* 440 U.S. at 153-54. Moreover, by encouraging claim-splitting in the pendent-jurisdiction context, the approach adopted below deprives the federal-court victor of the surer-footed federal interpretation of federal defenses, such as section 414, that are relevant to both the federal theory and the state theory.

B. Delaware's Purported Alternative Holding On Res Judicata Is Entirely Specious.

In res-judicata terminology, preclusive effect such as that asserted here by Toolco attaches only to a final judgment that is "on the merits." *See, e.g., Federated Department Stores,* 452 U.S. at 398. In what purported to be an alternative ground to its pendent-jurisdiction holding, the Delaware supreme court held that *Toolco I* was not an adjudication " 'on the merits' of the same claims alleged here to be violations of Delaware fiduciary law." *Toolco II,* App. 17a. In so holding, Delaware cited no federal authority and simply ignored the settled rule that a federal judgment bars a second suit as to all theories that could have been raised in the first action, as well as those that were actually raised.

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to exercise pendent jurisdiction over state claims, respondents were obligated to plead those claims if they wished to preserve them"); *id.* at 411 (Brennan, J., dissenting). The American Law Institute also supports this approach. *See* Restatement (Second) of Judgments § 25, Comment e and Reporter's Note (1982); Note, *The Res Judicata Implications of Pendent Jurisdiction,* 66 Cornell L. Rev. 608, 619 (1981).

TWA had only one *claim* (or cause of action) here, based on allegations that Toolco acted wrongfully toward TWA in jet-related activities from 1955-60. In *Toolco I*, TWA advanced a federal *theory* on that claim; in *Toolco II*, TWA advanced a state *theory* on the same claim. It is incontrovertible that *Toolco I* rejected TWA's federal theory on substantive grounds, squarely holding that section 414 and the pertinent CAB orders barred liability predicated on TWA's factual allegations and federal-law theory. For res-judicata purposes, such a judgment is plainly "on the merits" because it was "based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form." *Fairmont Aluminum Co. v. Commissioner*, 222 F.2d 622, 625 (4th Cir.), *cert. denied*, 350 U.S. 838 (1955).[39]

Contrary to the views of the Delaware court, there simply is no requirement in res-judicata law that the first judgment, if "on the merits" as to the theories presented in the first action, also address the substance of unraised theories. *See, e.g., Harper Plastics*, 657 F.2d at 943-44; *Rennie v. Freeway Transport*, 656 P.2d at 925-27.[40] Indeed, in the ordinary case, there is a high likelihood that a disposition "on the merits" of the theories raised would not fully meet the substance of unraised theories. Res-judicata principles nonetheless dictate preclusion of any unraised theory because the fact that the first court reached the merits of the theories raised shows that plaintiff had the opportunity to present unraised theories. *See, e.g., Rennie v. Freeway Transport*, 656 P.2d at 921-22; C. Wright, *The Law of*

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[39] The district court's 1973 opinion upon dismissing the federal complaint states expressly that the dismissal of TWA's federal antitrust claims was "upon the merits." *TWA v. Hughes*, 359 F. Supp. at 785, App. 119a. Upon TWA's motion, however, the district court further stated that the dismissal might not be "a bar to [TWA's] nonfederal claims." *Id.* In this regard, the district court expressly left it to the Delaware courts, with review in this Court, to determine the res-judicata effect of *Toolco I*. Thus, the court's dismissal order in no way limits the res-judicata effect of the dismissal mandated by this Court.

[40] *See, e.g., Angel v. Bullington*, 330 U.S. 183, 190 (1947) ("[i]t is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation"); 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4435, at 330 ("it is clear that an entire claim may be precluded by a judgment that does not rest on any examination whatsoever of the substantive rights asserted"). *See also* Fed. R. Civ. P. 41(b).

Federal Courts 680-81 (4th ed. 1983) ("[i]t is sufficient that in the first litigation there was an opportunity to get to the merits"). Thus, Delaware's ruling that the disposition in *Toolco I* was not "on the merits" for res-judicata purposes is wholly specious. At bottom, then, Delaware's res-judicata holding presents only the single question whether a state may withhold res-judicata effect from *Toolco I* simply because of the theoretical possibility that the federal trial court might have declined to exercise pendent jurisdiction over TWA's state fiduciary-duty theory had that theory been presented in the federal action.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of Delaware. Toolco further respectfully submits that Delaware is so clearly in error on the collateral estoppel and preemption points (*see* Parts I and II above) that the Court should consider summary reversal. *See* S. Ct. R. 23.1; R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 5.12(c) (7)(b) (6th ed. 1986); *Rose v. Arkansas State Police*, 107 S. Ct. 334 (1986); *Deen v. Hickman*, 358 U.S. at 57-58.

Respectfully submitted,

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Dated: July 27, 1988

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 73, 1987

Court Below:
Court of Chancery of the State of Delaware
In and for New Castle County
Civil Action No. 1607

SUMMA CORPORATION and WILLIAM R. LUMMIS,
Delaware Ancillary Administrator
of the Estate of Howard R. Hughes,
Defendants Below,
Appellants,

v.

TRANS WORLD AIRLINES, INC.,
Plaintiff Below,
Appellee.

Submitted: September 22, 1987
Decided: April 4, 1988

Before CHRISTIE, Chief Justice, HORSEY and MOORE, Justices.

Upon appeal from the Court of Chancery. AFFIRMED.

Andrew B. Kirkpatrick, Jr., Esquire (argued), Martin P. Tully, Esquire, Thomas Reed Hunt, Jr., Esquire, and Edmond D. Johnson, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington; David A. Jenkins, Esquire, of Lassen, Smith, Katzenstein & Furlow, Wilmington, for Appellants.

Louis J. Finger, Esquire, and Allen M. Terrell, Jr., Esquire, of Richards, Layton & Finger, Wilmington; William E. Hegarty, Esquire (argued), Dudley B. Tenney, Esquire, Marshall Cox, Esquire, Michael P. Tierney, Esquire, and Dierdre A. Burgman, Esquire, of Cahill, Gordon & Reindel, New York, Of Counsel, for Appellees.

MOORE, Justice

This accounting action has consumed more than twenty-five years of litigation between Trans World Airlines, Inc. ("TWA"), and the late Howard R. Hughes and his wholly owned enterprise, Hughes Tool Company ("Toolco").[1] In length of time, although certainly not in other respects, it may almost seem reminiscent of *Jarndyce* and *Jarndyce*.[2] The end, however, is in sight.

In 1962 TWA sued Hughes and Toolco in the Court of Chancery alleging that the defendants had breached their fiduciary duty of loyalty by deliberately interfering with TWA's commercial success to benefit themselves. After trial the Court of Chancery assessed damages plus interest of $48,349,022.48 against Toolco. The defendants challenge several aspects of the award, and the plaintiff appeals the calculation of post-judgment interest.

We find no error in the trial court's calculation of damages and interest. Accordingly, we affirm.

I.

The background of this case has been developed in earlier court opinions. *See Trans World Airlines, Inc. v. State ex rel. Porterie,* Del. Supr., 183 A.2d 174 (1962); *Trans World Airlines, Inc. v. Hughes,* Del. Ch., 185 A.2d 762 (1962); *Hughes v. Trans World Airlines, Inc.,* Del. Supr., 185 A.2d 886 (1962); *Trans World Airlines, Inc. v. Hughes Tool Co.,* Del. Ch., 187 A.2d 350 (1962); *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647 (1973); *Trans World Airlines, Inc. v. Hughes,* Del. Ch., 317 A.2d 114 (1974); *Hughes v. Trans World Airlines, Inc.,* Del. Supr., 336 A.2d 572 (1975); *Trans World Airlines, Inc. v. Summa Corp.,* Del. Ch., 374 A.2d 5 (1977). We review only those facts now essential to our decision.

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[1] Summa Corporation, the named defendant, is the successor in interest to Toolco. William R. Lummis is the Delaware ancillary administrator of the estate of Howard R. Hughes. For purposes of convenience we will refer to both defendants as "Toolco".

[2] The fabled and interminable litigation described in C. Dickens, Bleak House (C. Dickens ed. 1868).

In 1939 Howard R. Hughes, through Toolco, began acquiring stock in TWA. In 1942 Toolco had working control of TWA, owning 40% of its common stock. By 1958, Toolco had increased its holdings to 78%, and exercised control over TWA's day-to-day operations. Because Toolco was engaged in experimentation in aviation, and in the manufacture of airplane parts for the military services, its interest in TWA was closely scrutinized by the Civil Aeronautics Board ("CAB"). Pursuant to the Federal Aviation Act, 49 U.S.C. § 1300 (1982), ("FAA"), the CAB was empowered to regulate the sale, control, or other acquisition of an air carrier by "any person engaged in any other phase of aeronautics." Thus, all transactions which were likely to affect the nature of TWA's control by Toolco were subject to CAB approval.

Between 1950 and 1960 Toolco used its control position to TWA's detriment. Because of Hughes' evasive nature and difficult temperament, Toolco was slow to order the then novel jet airplanes which TWA needed to remain competitive. Toolco refused to allow TWA to purchase its own aircraft, preferring instead to buy the planes and sell or lease them to TWA at a profit. Several of the planes ordered for TWA, once delivered, were diverted to other airlines. Some planes never arrived due to Toolco's deliberate efforts to delay or stop their production. Many of those actions were designed to minimize both Hughes' and Toolco's tax exposure, but they also resulted in losses of profits to TWA.

In 1960, pursuant to a financing agreement between TWA and several banks, Toolco was forced to place its TWA stock in a voting trust controlled by the banks. Soon thereafter, in 1961 TWA sued Toolco in the United States District Court for the Southern District of New York (the federal action), alleging that Toolco had violated federal antitrust laws by refusing to allow TWA to purchase aircraft from other suppliers. In 1962, TWA brought the present suit in the Court of Chancery, alleging that Toolco breached its fiduciary duty by engaging in transactions tainted by self-interest. However, this case remained dormant pending the outcome of the federal action, which was concluded in 1973 when the United States Supreme Court rejected TWA's federal antitrust claims. *See Hughes*

Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647 (1973).

Thereafter, Toolco revived the present action by promptly moving for summary judgment, based upon res judicata grounds, arguing that under the Federal Aviation Act the Supreme Court of the United States' decision in the federal action rendered Toolco's transactions immune from all laws, including the fiduciary principles of Delaware corporate law. This Court rejected that contention, and held that under the United States Supreme Court's decision only those transactions which were specifically approved by the CAB were immune from all other restraints imposed by law. *Hughes v. Trans World Airlines, Inc.*, Del. Supr., 336 A.2d 572 (1975). Toolco then filed an answer admitting the well pleaded allegations of the complaint.

Both Toolco and TWA moved for summary judgment. Defendants again claimed transactional immunity on the theory that the damages which TWA sought arose out of the transactions approved by the CAB. The Court of Chancery rejected this defense. While the defendants were not required to account for profits realized in connection with the CAB approved acts, they were liable to TWA because there had been "no general approval by the Civil Aeronautics Board of the overall conduct of the defendants vis a vis plaintiff." *Trans World Airlines, Inc. v. Summa Corp.*, Del. Ch., 374 A.2d 5, 12 (1977).

Applying the intrinsic fairness test, the court granted partial summary judgment to TWA and ordered an accounting, holding that Toolco had not met its burden respecting the fairness of the transactions. *See Sinclair Oil Corp. v. Levien*, Del. Supr., 280 A.2d 717 (1971). However, the court denied TWA's claim that Toolco was liable for damages resulting from the sale or lease of airplanes to air carriers other than TWA, because TWA had failed to show that Toolco had derived a benefit which was detrimental to TWA. *See Summa*, 374 A.2d at 10, 12.

The trial court recognized that Toolco could not be held accountable for profits realized from transactions specifically

approved by the CAB, but ruled that if the transactions were part of an "overall control pattern" which harmed TWA, the latter was entitled to damages for such conduct. The court delineated five areas of control in which Toolco was subject to liability if damages were proven.

After nearly ten years of discovery, and trial on the issue of damages, the Court of Chancery awarded TWA $17,238,366 plus pre-judgment interest of $31,108,234. Post judgment interest was allowed only on the damage award.

Toolco's appeal raises four issues. First, it reurges the transactional immunity defense which both this Court and the Court of Chancery have previously rejected. Second, Toolco argues that its failure to place an earlier order for Boeing jets was not a breach of its fiduciary duty to TWA because TWA did not need that type of jet. Third, Toolco disputes the inclusion in the damage calculation of accounting changes made by TWA in late 1963. Finally, Toolco argues that the use of an interest rate in excess of the legal rate was erroneous. TWA has cross appealed the calculation of post-judgment interest, contending that it should be based upon both the damage and pre-judgment interest awards.

II.

The Federal Aviation Act, 49 U.S.C. § 1300 (1982) created the Civil Aeronautics Board to oversee and regulate the rapidly expanding airline industry. Pursuant to this authority the CAB could exempt transactions which were otherwise subject to antitrust or other laws. Thus § 414 of the FAA, 49 U.S.C. § 1384, provides:

> Any person affected by any order made under sections 1378, 1379 or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Because the sales and leases of airplanes between Toolco and TWA were approved by the CAB, the Supreme Court of the United States decided in the federal action that those transactions were exempt from the antitrust laws and "all other restraints or prohibitions made by, or imposed under, authority of law." However, as this Court held in *Hughes v. Trans World Airlines,* Del. Supr., 336 A.2d 572, 579 (1975), that did not confer a "blanket immunity" upon the actions of Toolco. Although specific transactions were immunized by CAB authority, Toolco's conduct which was not the subject of CAB review or approval, when taken as a whole, could involve violations of its fiduciary duties to TWA under Delaware law. The Court of Chancery later found such violations to the rights of the TWA minority.

Although Toolco was not held accountable for profits resulting from the specific transactions approved by the CAB, TWA claimed a loss of profits resulting from Toolco's inaction, rather than its actions. Thus, by failing to purchase jets in the early 1950's Toolco denied TWA the opportunity to be competitive and profitable. Moreover, Toolco's general conduct was actionable. By leasing planes to TWA, rather than selling them, and by selling planes to TWA only at a profit, Toolco had denied TWA the control required to be competitive in the airline industry. The CAB did not consider or approve any of those matters. As a whole, Toolco acted for its sole benefit at the expense of its fiduciary duties to TWA's minority shareholders. Merely because certain specific transactions were immunized by CAB approval did not relieve Toolco of its general fiduciary duties of loyalty and care.

III.

It is well established in Delaware that one who stands on both sides of a transaction has the burden of proving its entire fairness. *Weinberger v. UOP, Inc.,* Del. Supr., 457 A.2d 701, 710 (1985); *Sterling v. Mayflower Hotel Corp.,* Del. Supr., 93 A.2d 107, 110 (1952). In the absence of arms length bargaining, clearly the situation here, this obligation inheres in, and invariably arises from the parent-subsidiary relationship.

Weinberger v. UOP, Inc., at 709, n.7, 709-710; *Rosenblatt v. Getty Oil Co.*, Del. Supr., 493 A.2d 929, 937-38 (1985). This rule applies when "the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to the minority stockholders of the subsidiary." *Sinclair Oil,* 280 A.2d at 720.

Toolco was a 78% shareholder in TWA, and, exerting its control position, Toolco refused to allow TWA to purchase its own jets, delayed the production of jets which were ordered, unjustifiably rejected acceptable aircraft, forced TWA to enter into leases for aircarft, and sold airplanes to TWA at a profit—all to Toolco's benefit, but materially detrimental to the productivity and effectiveness of TWA. By fixing the terms of the leases and sales to TWA, Toolco thereby accrued substantial profits, reportable as capital gains, as well as other tax benefits. Furthermore, Toolco structured the transactions to minimize its exposure to risk at the expense of TWA's profits. Such conduct hardly comports with basic concepts of fair dealing under the fiduciary standards of Delaware corporation law.

Toolco's defense is essentially one of minimizing its actions. For example, it argues that TWA had no need for a full fleet of certain jet aircraft in 1955 because those planes did not have non-stop transatlantic capability. Thus, Toolco contends, it should not be held accountable for TWA's lost profits due to Toolco's failure to order such aircraft.

However, this argument, like Toolco's others, ignores the fact that the intrinsic fairness test placed the burden upon Toolco to prove that it was not the cause of TWA's lost profits. It could have done so by showing that the outcome of the transaction, had it been approved by an independent board of directors, would have been the same. The trial court found, and we agree, that Toolco failed to meet that burden.

Mr. Robert W. Rummel, a longtime employee of Toolco and TWA, testified that Hughes would not allow him to negotiate with one aircraft manufacturer because it refused to give Toolco the highest priority for delivery. The record also

demonstrates that this manufacturer found Hughes to be a very difficult person. This adversely affected TWA because it caused Toolco to lose the little priority it did establish for delivery of the aircraft. Substantial evidence indicates that had Toolco been willing to negotiate, TWA would have had a delivery priority competitive with other airline companies. Toolco's argument that it was waiting for jets with true transatlantic capability is without merit. Other airlines, who were willing to negotiate with this particular manufacturer put the same planes to use on their transatlantic routes until the later models were available. When updated transatlantic jets were produced, the manufacturer negotiated with the airlines to "roll over" the earlier models for the later ones. Thus, for reasons clearly attributable to the eccentric or idiosyncratic business methods of Howard Hughes, TWA was unable to establish a jet fleet as quickly as its competitors. Given this record, it is manifest that no independent board of directors could have taken such action in good faith and in the honest belief that it was in the best interests of TWA. See *Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 812 (1984). That point becomes even more apparent when one considers the application of the intrinsic fairness test here, and Toolco's failure to meet its burden of proof in that regard.

IV.

The specific damage issues upon which the Court of chancery focused at trial were:

1. Decreases in TWA's operating income for delayed delivery of Boeing jet aircraft.

2. Decreases in TWA's operating income for delayed delivery of Convair jet aircraft.

3. Decreases in TWA's operating income as a result of being limited to a smaller total fleet of jet aircarft.

4. Consequential damages, other than decreases in operating income, attributable to delayed delivery of Convair jet aircraft.

5. Increased expenses from being denied the right to acquire ownership of jet aircraft prior to December 30, 1960.

Trans World Airlines, Inc. v. Summa Corp., Del. Ch., No. 1607 (March 12, 1985) (Letter Opinion). After trial the court held that Toolco had failed to meet its burden of demonstrating that it did not cause damages to TWA in each of the foregoing categories. *Trans World Airlines, Inc. v. Summa Corp.*, Del. Ch., No. 1607 (May 15, 1986) (Opinion). If the trial court's findings are sufficiently supported, as here, by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them. *Levitt v. Bouvier*, Del. Supr., 287 A.2d 671, 673 (1972).

A. Delayed Delivery of Aircraft and the Resulting Smaller Fleet.

The record fully supports the Court of Chancery's conclusion that Toolco delayed the growth of TWA's fleet of aircraft. Rummel testified that due to Howard Hughes' idiosyncratic temperament Toolco did not order planes for TWA until well after the other major airlines had done so. In late 1955 Toolco finally ordered eighteen Boeing 707-320's, fifteen Boeing 707-120's and thirty Convair CV-880's.

Of these sixty-three planes only forty-five were eventually delivered to TWA. This reduction in the size of the fleet was deliberately caused by Toolco, who placed its order late and failed to negotiate for priority, thus putting TWA behind all of its competitors on Boeing's delivery schedule. Before the Boeing aircraft were delivered, Toolco sold the rights to six of the planes to Pan Am because Toolco was unable to obtain the necessary financing. Toolco had consistently refused to allow TWA to purchase any of the planes directly, choosing instead to lease them to TWA on a day-to-day basis. As to the CV-880's, Toolco intentionally interfered with their production, causing substantial delays in delivery, and diverted six of the planes to Northeast Airlines. Toolco's actions resulted in TWA having a forty-five, rather than the intended fifty-two, plane fleet, all to TWA's substantial detriment.

The calculation of TWA's lost profits was the central issue at trial. To prove its damages TWA presented Edward L. Wemple, a transportation engineer and consultant, who testified regarding revenues and projected revenues at various times

between 1956 and 1986. Much of Wemple's testimony regarding the probable success of TWA during the period at issue was corroborated by Rummel, the TWA-Toolco employee. These witnesses testified, based partially upon a 1959 report of Wemple's consulting firm, Coverdale & Colpitts, that TWA's passenger load factor would have increased substantially had TWA received delivery of all fifty-two jets.

In addition to testifying to the success of TWA in the airline industry generally, Wemple constructed a pro forma jet fleet which he used to calculate the net revenue effect of a smaller fleet. Based upon TWA's revenue and operating experience in the subject years, Wemple calculated the loss of profits due to the delay in delivery of the Boeings and Convair aircraft, and the loss due to the non-delivery of five Convair 880's. Wemple concluded that TWA suffered a loss of $33.9 million in revenue.

Finally, TWA called Joseph J. Rigney of Price, Waterhouse, an accounting firm, to reconstruct the financial records of TWA to determine the net effect on equity of the $33.9 million revenue loss. Using Wemple's figures and Rummel's operating expenses, as well as a pro forma financing plan presented by Dillon, Reed & Co., Inc., an investment banking firm, Rigney determined that the operation of a fifty-two plane fleet would have increased TWA's equity by $16.7 million. Based upon a careful study of the facts and figures presented, and after assessing the credibility of each of the expert witnesses, the trial judge determined that Toolco caused this loss in equity. Given our scope and standard of review, *Levitt v. Bouvier,* 287 A.2d at 673, the trial court's decision is fully supported by the record, and we accept its findings.

Toolco argues that the damages are inflated by $5.8 million because Rigney of Price, Waterhouse included in his calculation certain accounting changes made in the last quarter of 1963. Before 1963 TWA charged overhaul expenses to a reserve on the basis of the number of hours flown. In 1963 TWA began charging the overhaul expenses as operating costs. This eliminated the overhaul reserve and created additional equity. Toolco objects to Rigney's inclusion of this sum in his damage calculations.

The trial judge was satisfied that the use of this increased equity in calculating the damages was appropriate. We agree. The damage period selected by the court extended to the end of 1963. The selection of a 5¼ year damage period is supported by substantial evidence, and there was no error or abuse of discretion by the inclusion of the accounting changes in calculating damages through 1963.

B. Disruption of Business.

Because the CV-880's were delivered late, TWA had to pay idle flight crews, and once the CV-880's were delivered, TWA was forced to provide refresher training courses for both flight and ground crews. The trial judge concluded, based upon competent evidence, that TWA suffered a loss of $538,366. Again, the record fully supports that ruling.

V.

In calculating the pre-judgment interest the trial court used a rate of 7.32% based on the average of the legal rate of interest, 6%, and the composite interest rate for TWA's historic cost of borrowing, 8.64%. This rate of 7.32% was applied to the damage award over a 27 year period from 1960 until 1986, resulting in pre-judgment interest of $31,108,234. *Trans World Airlines, Inc. v. Summa Corporation,* Del. Ch., No. 1607 (January 21, 1987) (Opinion on Interest).

Toolco argues that the trial court erred by using a rate other than the legal interest rate, and by including in the pre-judgment interest calculation the period during which the case lay dormant. While the legal rate of interest has historically been the benchmark for pre-judgment interest, *Rollings Envtl. Serv., Inc. v. WSMW Indus.,* Del. Supr., 426 A.2d 1363, 1366 (1980), a court of equity has broad discretion, subject to principles of fairness, in fixing the rate to be applied. *Lynch v. Vickers Energy Corp.,* Del. Supr., 429 A.2d 497, 506 (1981); *Sinclair Oil Corp., v. Levien,* Del. Supr., 332 A.2d 139 (1975). In the Court of Chancery the legal rate is a mere guide, not an inflexible rule. *Missouri-Kansas Pipeline Co. v. Warrick,* Del. Supr., 22 A.2d 865, 868 (1941).

In selecting the interest rate the trial court considered the nature of the plaintiff, the nature of the wrong to be remedied, and the peculiar facts of the case. Each of those factors was appropriate, and there was no abuse of discretion in the court's choice of rate.

Nor did the court abuse its discretion in including the years of 1962-1973 as part of the pre-judgment interest calculation. A successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues. *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.,* Del. Supr., 220 A.2d 778, 781-82 (1966). However, a court may, in its discretion, deny a plaintiff interest if he delayed prosecution of his claim. *Moskowitz v. Mayor of Wilmington,* Del. Supr., 391 A.2d 209, 211 (1978); *Maryland Casualty Co. v. Hamby,* Del. Supr., 301 A.2d 286, 288 (1973). The trial court found that the ten year delay was due to the nature and tactics of the defendant, Howard Hughes, and to acquiescence by both parties. The plaintiffs did not unilaterally delay the litigation.

VI.

Finally, TWA's cross-appeal seeks to have post-judgment interest calculated upon both the damage award and pre-judgment interest. TWA cites no Delaware authority for its position. In *Francis I. duPont & Co. v. Universal City Studios, Inc.,* Del. Ch., 343 A.2d 629 (1975), the court specifically refused to apply post-judgment interest to an award of pre-judgment interest. The Delaware courts have traditionally disfavored the practice of compounding interest, and we see no reason to depart from that rule here. Thus, TWA's cross claim is without merit.

The judgment of the Court of Chancery is AFFIRMED.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 90, 1974

HOWARD R. HUGHES and HUGHES TOOL COMPANY,

Defendants Below,
Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Plaintiff Below,
Appellee,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, HARRY C. HAGERTY, ERNEST R. BREECH and CHARLES C. TILLINGHAST, JR.,

Certain Additional
Defendants Below,
Appellees

(Argued September 25, 1974 Decided February 26, 1975.)

Before:

DUFFY, *Justice,* MCNEILLY, *Justice,* and
BIFFERATO, *Judge.*

Upon appeal from the Court of Chancery. Affirmed.

George Tyler Coulson, of Morris, Nichols, Arsht & Tunnell, Wilmington, and Chester C. Davis and Maxwell E. Cox, of Davis & Cox, New York City, for defendants below, appellants.

Louis J. Finger, of Richards, Layton & Finger, Wilmington, and Dudley B. Tenney, Paul W. Williams, Marshall Cox and Michael P. Tierney, of Cahill Gordon & Reindel, New York City, for plaintiff below, appellee.

Leroy A. Brill, of Bayard, Brill & Handelman, Wilmington, and Marvin Schwartz, of Sullivan & Cromwell, New York City, for Ernest R. Breech, additional defendant below, appellee.

William Prickett, of Prickett, Ward, Burt & Sanders, Wilmington, and John R. Hupper and Andrew P. Tashman, of Cravath, Swaine & Moore, New York City, for certain other additional defendants below, appellees.

DUFFY, *Justice:*

This appeal brings up for review an order of the Court of Chancery denying a motion to dismiss the complaint and granting motions to dismiss certain counterclaims.

I

The case involves a contest, long in litigation, between Howard R. Hughes and Hughes Tool Company (Toolco) (defendants), on the one side, and Trans World Airlines, Inc., (plaintiff), on the other.[1] The pertinent facts are stated in the opinion of the Vice Chancellor, 317 A.2d 114 (1974), and we will restate them only to the extent necessary as we consider defendants' argument for reversal.[2]

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[1] Privity between Hughes and Toolco is conceded by each side and for present purposes their positions are indistinguishable.

[2] See also the many opinions in the Federal Courts; thus: *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647 (1973); rehearing den. 410 U.S. 975, 93 S. Ct. 1435 (1973); cert. granted 405 U.S. 915, 92 S. Ct. 960 (1972); 2 Cir., 449 F.2d 51 (1971); S.D.N.Y., 359 F. Supp. 783 (1973); S.D.N.Y., 312 F. Supp. 478 (1970); S.D.N.Y., 308 F. Supp. 679 (1969). Earlier opinions are reported at 380 U.S. 248, 85 S. Ct. 934 (1965); 379 U.S. 912, 85 S. Ct. 261 (1964); 2 Cir., 332 F.2d 602 (1964); S.D.N.Y., 214 F. Supp. 106 (1963); see also: Del. Supr., 185 A.2d 886 (1962).

II

In *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, supra (1973 opinion), the Supreme Court of the United States concluded that TWA's complaint against Toolco for alleged anti-trust violations and damages should be dismissed and, in accordance with its mandate, the United States District Court for the Southern District of New York entered a judgment of dismissal.

Briefly, the complaint in this action is based on alleged violations of fiduciary duties to the corporation and its minority stockholders by corporate officers and the majority stockholder. For present purposes, it appears that the facts alleged are substantially the same as those pleaded in the anti-trust action. Defendants argue that the Federal judgment bars prosecution of this case. They say that judgment was valid, final, personal and on the merits of the same claims asserted here (and which could have been asserted there). In so contending, they invoke the familiar doctrine of *res judicata.*

Res judicata embodies a rule of public policy that courts as well as litigants should have rest and repose from vexatious renewal of the same lawsuit. *Epstein* v. *Chatham Park, Inc.*, Del. Super., 153 A.2d 180 (1959). It precludes a second attempt to litigate the same "cause of action" and, under certain circumstances, matters which might have been litigated in the prior suit. *Ezzos* v. *Ackerman,* Del. Supr., 234 A.2d 444 (1967). Clearly, a valid, final and personal judgment entered on the merits of a controversy puts to rest all matters litigated. *Restatement of Judgments* § 48 (1942).

Central in the rule is the rationale that a person is entitled to an opportunity to once litigate a claim on its merits, and once only. Renewal of the same claim after disposition on its merits is not permissible, whatever the theory. But basic to the principle of rest and repose is the notion that one is entitled to his day in court on the merits of a claim. This means that a judgment for a defendant, which is valid and final but not "on the merits," is conclusive only as to what is actually decided. *Restatement,* supra, § 49.[3]

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[3] We do not consider such matters as jurisdiction and capacity. See Comment *a* to § 49.

These principles are well known and, indeed, there is little, if any, dispute about them as long as they remain in abstraction. But our duty is to test them against the submissions in the dispute, and now we do so.

As we have noted, the Toolco (and Hughes)-TWA litigation has been on-going for years but, beyond doubt in deciding this case, the key opinion is the 1973 decision by the United States Supreme Court. That was dispositive of all litigation in the Federal Courts and it mooted all that had gone before which was inconsistent with the result. The default by Toolco and the entry of a money judgment were among the casualties of the Supreme Court mandate.

The Supreme Court opinion considers many matters but our reading persuades us of two things which are significant for present purposes: first, the Court considered the controversy only and entirely in the context of the Federal anti-trust statutes; and, second, it did not consider whether the complaint stated a cause of action under those statutes.

As to the first of these, an extended review of the opinion by Justice Douglas is not needed to document the conclusion that the Court disposed of the litigation entirely on the basis of anti-trust principles, statutory and decisional.

"It is our view," he wrote, "that the Court of Appeals erroneously rejected" Toolco's defense that the transactions attacked in the complaint "were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act of 1958 these transactions have immunity from the anti-trust laws." He discussed the Federal Aviation Act, the duty and authority of the Civil Aeronautics Board, the relationship of Toolco and TWA and the Board's duty to supervise it, and specific transactions approved by the Board. Following the Court's earlier decision in *Pan American World Airways Inc.* v. *United States,* 371 U.S. 296, 83 S. Ct. 476 (1963), he found that CAB jurisdiction "pre-empts the anti-trust field." In short, Justice Douglas found that the way in which control of an air carrier is exercised is under CAB surveillance, "not in the hands of those who can invoke the sanctions of the anti-trust laws."

And then, as to the Federal complaint on which the case reached the Supreme Court, Justice Douglas wrote: "Whether or not that complaint states a cause of action under the anti-trust laws is a question we do not reach." Since the Court did not reach even the allegations of the complaint, it obviously did not consider the merits of the proof offered by TWA in support thereof.[4]

Given the basis on which the Supreme Court ordered termination of the litigation in the Federal Courts, we cannot say (in either law or justice) that the merits of the controversy were reached. The merits *were* reached in the District Court where a default had been entered, evidence had been received and a money judgment entered (and affirmed by the Circuit Court). But all of that was made irrelevant by what the Supreme Court decided. Certainly it made no factual adjudication. And it disposed of the litigation, not on the basis of default or evidence or money judgment, but on the transactional immunity conferred by the CAB under the Federal Aviation Act to a complaint founded on a Federal anti-trust statute.

In this context we conclude that the decision by the United States Supreme Court was not "on the merits" of the same claims alleged here to be violations of Delaware fiduciary law. Thus a significant requirement for a bar by *res judicata* is missing. *Epstein* v. *Chatham Park, Inc.*, supra; *Restatement*, supra, § 49, and that defense does not stop the litigation.

III

There are other arguments to consider and weigh, and we now turn to defendants' contention that, under Rule 41(b) of the Rules of Civil Procedure, the dismissal by the District Court in New York was an adjudication on the merits.

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[4] The Court did discuss five transactions which were a basis of damages awarded by the District Court but it did so only for the purpose of determining whether such transactions were "neutralized" by CAB approval.

Chancery Rule 41(b), like the Federal Rule, provides that

> "... [u]nless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

To the extent defendants argue that the Supreme Court opinion directing dismissal was an adjudication on the merits, for purposes of this case, the contention is without merit for reasons already stated. But it was the District Court which entered the dismissal order and the argument by defendants obliges us to examine what was done in and by that Court.

Judge Metzner filed an opinion with the order of dismissal so we have the benefit of his view of what was done, and that is particularly significant since Rule 41(b) attaches consequences to a dismissal "[u]nless the Court ... otherwise specifies."

First, it is clear that the dismissal was upon the merits "as far as the federal claims are concerned." But, in our view, a fair reading of Judge Metzner's opinion does not lead to the same conclusion about the non-federal claims. On the contrary, we are satisfied that he believed such claims are *not* barred by his order. Thus, he wrote that "it does not follow that such a dismissal [in the Federal Court] would be a bar to the nonfederal claims" and then discussed *Calderone Enterprizes Corp.* v. *United Artists Theater Circuit, Inc.,* 2d Cir., 454 F.2d 1292 (1971), cert. den. 406 U.S. 930 (1972). In that case the Second Circuit stated that since "federally-based claims were dismissed prior to trial, ... pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief." Judge Metzner particularly noted that the dismissal in *Calderone* had not been made without prejudice, and then he said this:

> "... I gather from this that such a safeguard is not necessary to protect whatever rights plaintiff may have in this regard. It might also be argued that, standing alone, the court is without jurisdiction of the

> state claims and thus the dismissal is for lack of subject matter jurisdiction which is not on the merits under Rule 41(b)."

The Court was under a mandate from the United States Supreme Court "to dismiss the complaint" and its reluctance to amend that directive was explicit, while observing that there is doubt as to whether an amendment "is necessary to protect the interests of the parties."

Under Rule 41(b) a prior dismissal operates as an adjudication upon the merits unless the court in its dismissal order otherwise specifies. We are satisfied that the District Court intended that its order would not settle non-federal claims and, to that significant extent, it otherwise specified. Thus, neither the order nor the Rule, singly or in combination, operates as an adjudication to bar assertion of the claims here.

IV

We turn now to defendants' argument that the claims alleged in the complaint could have been asserted in the Federal action under the theory now advanced. In brief, they say that the Federal Court would have taken pendent jurisdiction of the claims based upon violation of fiduciary duties and the right to litigate such claims in the state forum terminated with the judgment in that Court.

Acceptance of pendent jurisdiction by a Federal Court is a matter of judicial discretion. While such jurisdiction has been taken by those Courts for many years, the key opinion defining it was written by Justice Brennan after the TWA-Toolco-Hughes litigation had been on-going for some five years. In *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 86 S. Ct. 1130 (1966), the court stated:

> "... Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority * * *,' ... and the relationship be-

> tween that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.
>
> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiciton over state claims, even though bound to apply state law to them, ... Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." (Citations and footnotes omitted.)

We are asked to hold now that if the District Court had been requested in 1961 to exercise its discretion and take jurisdiction of the non-federal claims based upon violation of Delaware fiduciary duties, it would have done so; and we are further asked to hold now that had it done so the Federal Courts would in some way or other have dealt with the claims.

It is true that the District Court was asked to and did accept jurisdiction of TWA's (non-federal) claim for tortious interference with its business, but in divining what might have been a dozen years ago we cannot ignore what has taken place in the law since then.

In *Gibbs* the Supreme Court "completely reformulat[ed] the doctrine; [and] greatly expanded the permissible exercise of pendent jurisdiction" in the Federal Courts, *UMW v. Gibbs and Pendent Jurisdiction,* 81 Harv. L. Rev. 657 (1968). But even with that expansion, *Gibbs* makes clear that if Federal claims, which are substantial in a jurisdictional sense, are dismissed before trial, "the state claims should be dismissed as well." While in one sense the TWA claims in the Federal Court were not dismissed before trial, the result of the Supreme Court opinion (which in no way deals with the merits of the claims) surely gives that effect. To state the point somewhat differently, if an action for alleged violation of an anti-trust statute is now filed in a Federal Court and if the transactions in question have been approved by the CAB, there can be no doubt that the complaint will be dismissed and, under *Gibbs,* the Court will *not* assume jurisdiction of pendent (state) claims.[5]

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[5] Defendants rely upon *Rosado v. Wyman,* 397 U.S. 397, 90 S. Ct. 1207 (1970) and *Hagans v. Lavine,* ____U.S.____, 94 S. Ct. 1372 (1974), in support of a contrary proposition. In both of those cases the pendent (statutory) claim was *Federal* (appended to Federal constitutional claims), not *state,* and the distinction is significant in the process of conjecturing whether or not a Federal Court will entertain a pendent claim. As Justice Douglas said in his concurring opinion in *Rosado:*

> "The main distinction between this case and *Gibbs* is that the pendent claim here was one of federal rather than state law. And it is clear from the opinion in *Gibbs* that the factor of federal-state comity is highly relevant in deciding whether or not the exercise of pendent jurisdiction is proper. Thus the Court stated: 'There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.' *Id.,* at 727, 86 S.Ct., at 1139. Since the claim involved here is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances should be required to prevent the exercise."

Hagans discussed state claims but only in the context of attachment to Federal constitutional claims, thereby invoking the preference for first deciding non-constitutional issues. As the *Hagans* Court said:

> "... [T]he rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity

(footnote continues)

In short, we have the benefit of hindsight in deciding whether the TWA claims alleged for violation of Delaware fiduciary duties should be regarded as ones over which the Federal Court would have assumed jurisdiction (as it did with the claim for tortious interference), and we cannot ignore what the United States Supreme Court decided both in this case and in *Gibbs*. Admittedly, the issue has its uncertain aspects because the court did take on the claim for tortious interference. But, in our view, it would elevate speculation over reality to now dispose of this case by theorizing about what might have been (had the State claims been raised pendently in 1961).

And if there were any doubt about what ruling should be made the commands of justice require us to give TWA its days in court on the claims.

It should also be noted that the Chancery complaint was filed in 1962 and defendants did nothing to either bring it on for disposition or to ask the Federal Court to accept jurisdiction of the claims. On the contrary, in 1963 defendants joined TWA in persuading the Vice Chancellor to let the case (and, necessarily, the claims made herein) rest while awaiting determination of the Federal case. The court did so and defendants acquiesced therein for ten or eleven years.

In sum, we decline to deny TWA all opportunity to litigate its claims on the theory that the Federal Court would have taken jurisdiction of them.

(footnote continued)

> with the controlling principles and the authority to render a final judgment. These considerations favoring state adjudication are wholly irrelevant where the pendent claim is *federal* but is itself beyond the jurisdiction of the District Court for failure to satisfy the amount in controversy. In such cases, the federal court's rendition of federal law will be at least as sure-footed and lasting as any judgment from the state courts."

It is *Gibbs* which deals explicitly with a pendent state claim, and we follow its rule.

V

Next, we consider defendants' argument that the CAB orders, which the Supreme Court held were a defense to the Federal action, likewise bar this action.

Section 414 of the Federal Aviation Act, 49 *U.S.C.* § 1384, provides that any person affected by an order under § 408 is relieved

> "... from the operations of the anti-trust laws ... and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

The Vice Chancellor found that neither the purpose of the Act nor its case history bars a state action based on breach of a fiduciary duty.

Essentially, defendants argue that § 414 means what it says and that, once CAB approval is given, *all* other restraints or prohibitions are barred.

Locating state law in areas subject to Federal regulatory jurisdiction is difficult, but that does not mean it has vanished. Certainly state power (and responsibility) does not disappear merely because there is Federal regulation in an area of commerce. The guiding principle was restated by the Supreme Court in *Merrill Lynch Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 94 S. Ct. 383 (1973), when it considered the extent to which authority delegated under a Federal regulatory statute (Securities Exchange Act of 1934 § 6, 15 *U.S.C.* § 78(f) preempts state (labor) law; the Court quoted from an earlier opinion by Justice Brennan, thus:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained."

As the Vice Chancellor stated, the purpose of the Federal Aviation Act is to centralize power in the public interest so that rules may be made for the "safe and efficient use of the nation's air space." *Air Line Pilots Association, International* v. *Quesada,* 2 Cir., 276 F.2d 892 (1960). Section 414 must be read in light of that purpose and the specific preservations of common law (and statutory) remedies by § 1106 of the Act, 49 *U.S.C.* § 1506, which provides:

> "Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies."

We deal here with an intra-corporate conflict. The claims are large, the events are dated and complex; but in essence, the contest simply invokes standards of conduct applicable to corporate fiduciaries and litigated over the years in Delaware Courts. Nothing has been called to our attention which persuades us that the Congress intended to preempt State power to regulate such conduct (as part of our "housekeeping" function, if nothing more) and vest it in the CAB. What remedies would the Board provide? What judgments would it render? What protection would it accord to minority stockholders, and by what process?

The short of it is that the CAB's basic mission and competency is, as Chief Justice Burger emphasized in his dissent in *Hughes Tool,* supra, the regulation of entry into and competition within the air transportation industry. There has been here no showing that any general Federal purpose is vested in the CAB to preempt state regulation of the intra-corporate affairs of those subject to CAB jurisdiction for airline regulation purposes. See *Newmark* v. *RKO General Inc.,* S.D.N.Y., 294 F. Supp. 358, aff'd 2 Cir., 425 F.2d 348 (1970); and *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.,* 372 U.S. 714, 83 S. Ct. 1022 (1963); and compare *Colonial Airlines* v. *Janas,* 2 Cir., 202 F.2d 914 (1953), in which the Court noted that it is "clear from . . . the Act," 49 *U.S.C.* § 676, that the CAB had not made any determination of state law liability running to a corporation from its officers on charges of defalcations.

We must, and of course do, give deference to all that the CAB approves within the jurisdiction assigned it by the Congress. And we specifically refrain from any comment as to the significance of CAB approval of any specific transaction upon liability of defendants. As TWA concedes in its brief, whether any particular issues were finally determined in the Federal action is not at issue in this appeal. We are concerned here only with defendants' contention that a blanket immunity flows from § 414, no matter the circumstances. We decide that TWA may proceed with the litigation.

VI

Finally, we take up the counterclaims defendants filed against The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Harry C. Hagerty, Ernest R. Breech and Charles Tillinghast, Jr. (additional defendants) seeking injunctive and other relief. The Vice Chancellor ordered dismissal of the counterclaims on the ground that they are barred by the doctrine of *res judicata.*

As we understand defendants' argument, they say that if the Vice Chancellor's order stands and the Federal order is not a bar to TWA's action, this Court should require an even-handed result; that is, "Both should be dismissed or neither."

In our opinion the Vice Chancellor was right in dismissing the counterclaims. Defendants' argument assumes that the rationale for dismissals by the Federal Court of the complaint and the counterclaims was the same, and that is not so. We have already discussed at some length the basis for dismissal of the complaint as ordered by the United States Supreme Court. The counterclaims were dismissed, not on the absence of a statutory remedy or CAB approval, but specifically on their merits and "with prejudice" because of Toolco's "willful and deliberate disobedience of and failure and refusal to comply with" certain discovery orders of the District Court.[6] The Court

[6] As to the first five Federal counterclaims; the sixth counterclaim was disposed of on the merits, TWA's motion for summary judgment being granted by the District Court. These six Federal counterclaims are identical in scope to the four counterclaims asserted in this Chancery action.

of Appeals affirmed, 2 Cir. 332 F.2d 602 (1964), and its decision became final when the United States Supreme Court dismissed its writ of certiorari as improvidently granted. 380 U.S. 249, 85 S. Ct. 934 (1965).

* * * * *

Affirmed.

MANDATE

THE SUPREME COURT
OF THE STATE OF DELAWARE

To the Honorable the Judges of the Court of Chancery of the State of Delaware in and for New Castle County:

Greeting:

WHEREAS, before you or some of you in a cause entitled as follows:

C. A. 1607

HOWARD R. HUGHES, et al.

vs.

TRANSWORLD AIRLINES, INC.

a certain judgment or order was entered on the 19th day of March 1974, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on February 27, 1975, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable D. L. Herrmann our Chief Justice, at Dover, the First day of January, A. D. 1975.

Issued April 1 1975

T. E. TOWNSEND, JR.
Clerk of the Supreme Court